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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )  
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Special Access Rates for Price Cap Local )  
Exchange Carriers )  
 )  
AT&T Corp. Petition for Rulemaking to Reform )  
Regulation of Incumbent Local Exchange Carrier )  
Rates for Interstate Special Access Services )  
 )

WC Docket No. 05-25

RM No. 10593

**COMMENTS OF BT AMERICAS INC.**

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Dated: June 13, 2005

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**COMMENTS OF BT AMERICAS INC.**

BT Americas Inc. ("BTA") submits these Comments on behalf of itself and its affiliate BT Infonet USA ("BT-IUSA") pursuant to the Commission's NPRM published in the Federal Register on April 13, 2005.<sup>1</sup> The Commission seeks comments on what interstate special access regime should be put in place post-CALLS, what should be done with the pricing flexibility rules; and what interim relief, if any, is necessary until the Commission makes its determination. For the reasons set forth below, the Commission needs to reset special access rates at Long Run Incremental Cost ("LRIC") and then annually readjust the rates in accordance with a price cap adjustment mechanism that follows inflation and which includes a productivity adjustment ("X-factor") and an earnings sharing component. BT supports the proposal for an interim X-factor of 5.3 percent for interstate special access, so long as such interim relief is replaced with permanent relief before any approval of the SBC/AT&T and Verizon/MCI mergers.

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<sup>1</sup> 70 Fed. Reg. 19381 (April 15, 2005).

## **INTRODUCTION AND SUMMARY**

BTA is a U.S. company and subsidiary of BT plc. It has section 214 licenses and serves the global information and communications technology needs of large business (“enterprise”) customers. Its sister company in the US, BT-IUSA, has provided managed international information and communications services to enterprise customers in the US since 1988. BT is a major purchaser of special access services in the United States. BT employs over 3000 people in the United States. BTA’s relationship with BT (the incumbent carrier in the UK) provides BTA with unique insight into the concerns of both incumbent and competitive carriers.

The record is clear that today the Bell Operating Companies (“BOCs”) are charging extremely high special access rates that have raised costs substantially and unjustifiably for enterprise customers, which comprise the businesses at the heart of our nation’s economy. When they are forced to fund BOC returns on investment of 76% or more, America’s economy suffers because that expenditure could be funding productive investment. On that basis alone, the public interest requires a roll-back of the Commission’s well-intentioned, but ultimately flawed, pricing flexibility policy. However, the proposed mergers of SBC/AT&T and Verizon/MCI will turn what has been a profound ratemaking problem into destruction of the competitive enterprise service market itself, by virtue of the irresistible incentives these mergers create for the merged companies to discriminate against their competitors in pricing and provisioning.

The post-CALLS interstate special access regime should be that which will achieve what the Commission sought to accomplish in the first place, to “drive interstate

access charges toward the costs of providing these services.”<sup>2</sup> In view of the proposed mergers, the Commission needs to reset special access rates at economic costs (LRIC)<sup>3</sup> similar to what the BOCs incur. As shown below, LRIC based charges are what BT, the incumbent in the United Kingdom, is allowed to charge competitors in the UK, including any SBC/AT&T or Verizon/MCI combination. Until true competition emerges, BOC access rates should be derived and adjusted by regulatory intervention (to rectify the current unreasonable profits levied by the respective incumbents in the U.S.) and then annually set in accordance with a price cap adjustment mechanism that follows inflation and which includes a productivity adjustment (“X-factor”) and an earnings sharing component.

BT would support the request submitted to the Commission by eCommerce & Telecommunications User Group (“eTUG”) and the Telecommunications Committee of the American Petroleum Institute (“API”) to adopt an interim X-factor of 5.3 percent for interstate special access, although BT believes a larger X-factor is necessary in any final order.<sup>4</sup> And for the reasons set forth in Part II below, any interim relief would have to be replaced with permanent relief before the SBC/AT&T and Verizon/MCI mergers can be approved.

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<sup>2</sup> *In re Unbundled Access to Network Elements, Order on Remand*, WC Dkt. No. 04-313, CC Dkt. No. 01-338, 2005 WL 289015 (“*TRO Remand Order*”), ¶ 61.

<sup>3</sup> A proxy would be Unbundled Network Elements (“UNE”) pricing at TELRIC rates.

<sup>4</sup> Letter from Brian R. Moir, counsel for eTUG and C. Douglass Jarett, counsel for API, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in WC Dkt. No. 05-25 and WCB/Pricing Dkt. No. 05-22 (May 10, 2005) (“eTUG/API Letter”).

I. THE RECORD SHOWS THAT THE BOCS ALREADY DOMINATE SPECIAL ACCESS AND HAVE IMPOSED EXTREMELY HIGH PRICING

The record shows that the BOCs retain pervasive market power in special access, particularly at the DS-1 and DS-3 levels, for which there are very high barriers to entry.<sup>5</sup> The record also shows extremely high pricing in those areas where Phase II deregulation has been granted.<sup>6</sup> The record shows that the Bells filed numerous tariff amendments in pricing flexibility areas that raised their prices for special access services, including a price increase soon after the *USTA IP's vacatur* of the Commission's transport rules.<sup>7</sup>

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<sup>5</sup> This includes the original Declaration of Professors Willig and Ordover, submitted with AT&T's Petition in *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM No. 10593 ("Special Access Proceeding") (Oct. 15, 2002) ("AT&T's Special Access Petition"), and the Reply Declarations submitted in that proceeding by Lee Selwyn, Exhibit 2 and Willig and Ordover, Exhibit 3, to Reply Comments of AT&T Corp. (Jan. 23, 2003), and Declaration of Michael D. Pelcovits on behalf of WorldCom, Exhibit A to WorldCom's Special Access Comments (Jan. 23, 2003) ("Pelcovits Declaration"). Dr. Selwyn supplemented his analysis in *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Dkt. No. 04-313, CC Dkt. No. 01-338 ("the TRO Remand proceeding"), with Declarations submitted by Dr. Selwyn with the Comments of AT&T Corp. in the TRO Remand proceeding, WC Dkt. No. 04-313, CC Dkt. No. 01-338 (Oct. 4, 2004) ("AT&T's TRO Remand Comments"), Exhibit F ("Selwyn TRO Remand Declaration"), and the Reply Comments of AT&T Corp. in the TRO Remand proceeding, WC Dkt. No. 04-313, CC Dkt. No. 01-338 (Oct. 19, 2004) (AT&T's TRO Remand Reply Comments) Exhibit D ("Selwyn TRO Remand Reply Declaration"). See also, *In the Matter of AT&T and SBC Communications Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of AT&T Corp. to SBC Communications Inc.*, WC Dkt. No. 05-65 ("SBC/AT&T Merger Proceeding") Reply Declaration of Lee L. Selwyn on behalf of Comptel/ALTS (filed May 10, 2005) ("Selwyn Merger Declaration"). All of these declarations are incorporated into this proceeding by reference.

<sup>6</sup> See, Declaration of Stephen Friedlander and the Declaration of M. Joseph Stith ("Stith Special Access Declaration") submitted with AT&T's Special Access Petition (Oct. 15, 2002) as well as M. Joseph Stith's Reply Declaration in that proceeding, Exhibit 1 to AT&T's Special Access Reply Comments (Jan. 23, 2003) ("Stith Reply Special Access Declaration"). The Stith declarations were updated in the TRO Remand proceeding with Declaration of M. Joseph Stith submitted with AT&T's TRO Remand Comments, Exhibit H (Oct. 4, 2004) ("Stith TRO Remand Declaration") and Declaration of M. Joseph Stith submitted with AT&T's TRO Remand Reply Comments, Exhibit E (Oct. 19, 2004) ("Stith Reply TRO Remand Declaration"). All of these declarations are incorporated into this proceeding by reference.

<sup>7</sup> AT&T's TRO Remand Comments at 105-06, Benway-Holleron-King-Lesher-Mullan-Swift Dec., Exhibit B thereto, ¶¶ 13, 33, 36 (that declaration is also incorporated herein by reference) and Stith TRO Remand Declaration, Atts. 1,2; and AT&T's TRO Remand Reply Comments at 85-86 and Stith Reply TRO Remand Declaration Atts. 1,2.

The BOC rates are not only higher than UNE rates, but higher than special access rates under price caps in areas where there is no pricing flexibility.

The record also shows steady or increasing earnings and revenues. An analysis of embedded/historical costs using ARMIS data,<sup>8</sup> shows accounting rates of return in 2004 in excess of 76% for three of the four largest price cap LECs.<sup>9</sup> For example, for the year ended December 31, 2004, SBC's realized rate of return on its embedded investment in the interstate special access services category was 76.19% up from 63.16% for the previous year, while its revenues grew at double digit year-over-year rates to \$4.5 billion in 2004.<sup>10</sup>

The results are even more dramatic if a TELRIC analysis is used.<sup>11</sup> The forward looking cost analysis shows, for example, that in 2004 Verizon North's "discounted" DS1 special access rates were 129% higher than comparable UNE rates and SBC-Ameritech's "discounted" DS1 special access rates were 171% higher than comparable UNE rates.<sup>12</sup>

A comparison of BT's UK and the BOCs' US special access rates further proves that the BOCs' special access rates are priced substantially above competitive rates. For

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<sup>8</sup> AT&T's Special Access Petition at 7-8, Friedlander Declaration, ¶¶ 2-7 and Exhibits 1 and 2. Rates calculated from 2001 ARMIS 43-01, Table 1, Cost and Revenue Table, Column S, Rows 1910 and 1915 were: VZ 21.72%, VZ (excluding NYNEX), 37.08%, Qwest 46.58%, BLS 49.26% and SBC 54.6%.

<sup>9</sup> eTUG/API Letter, *supra* n. 4.

<sup>10</sup> Selwyn Merger Declaration, at ¶¶ 10, 48-49, Figure 2 and Table 2, based on the ARMIS 43-04 Report.

<sup>11</sup> *Stith Special Access Declaration, Stith TRO Remand Declaration and Stith Reply TRO Remand Declaration*, see n. 6 *supra*. As shown therein, special access services are provided over the same facilities as, and are functionally equivalent to, high- capacity loop and transport UNEs set under the Commission's forward-looking, economic cost methodology. Mr. Stith compared the Bells' tariffed interstate special access rates, on a state-by-state basis, with the rates for functionally equivalent cost-based UNEs. Mr. Stith conducted this analysis using both the Bells' "month-to-month" special access rates and its discounted offerings; he also conducted his analysis with respect to the Bells' special access rates in MSAs where they have obtained full "pricing flexibility" and in areas where they continued to be governed by price caps.

<sup>12</sup> *Stith TRO Remand Declaration* ¶¶ 17-24. AT&T's TRO Remand Reply Comments respond to the BOCs' arguments that they have not earned unusual revenues or rates of return. *Id.* at 82-85. *See also*, Selwyn TRO Remand Reply Declaration ¶¶ 80-86 (analysis based on revenues and costs per voice grade equivalent (VGE) found that much of the increased profits of the RBOCs was due to the widening special access price/cost gap – while average RBOC revenue per VGE was declining slightly, average RBOC operating, plant and investment costs per VGE were declining very significantly; this widening gap is the source of the RBOCs' steadily increasing rate of return).

example, BT's 2004 pricing for 5 Year Term 1 and 2 Mbps rates in the United Kingdom was well below that of 2004 5 Year Term SBC and Verizon averaged DS-1 rates. Likewise BT's 2004 rate for 5 Year Term 45 Mbps special access in the United Kingdom was well below that of 5 Year Term SBC and Verizon averaged DS-3 rates. The difference in pricing demonstrates the difference between BT's fully incremental cost-based special access rates in the UK<sup>13</sup> and the pricing charged by unregulated dominant providers of access *i.e.*, the BOCs.<sup>14</sup> Partial Private Circuits (PPCs) in the United Kingdom are lower because rates are based on LRIC, there is accounting separation between BT's wholesale and retail activities, and BT must publish key performance metrics. BT's PPC prices have been decreasing on average by 5-7% per year with a rate of return of capital employed ("ROCE") initially set at 13.5% and with a proposed reduction to a lesser percentage point. The 76+% earned by the BOCs lends clear support to the evidence that they achieve extremely high profits.<sup>15</sup>

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<sup>13</sup> Direction Under Regulation 6(6) Of The Telecommunications Interconnection Regulations 1997 Relating To A Dispute Between British Telecommunications plc And GTS, FIBERNET, Global Crossing, NEOSCORP, THUS, WorldCom, ENERGIS And COLT Concerning The Provision Of Partial Private Circuits, [http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/leased\\_lines/ppc1202/direction.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/leased_lines/ppc1202/direction.htm); Review of the retail leased lines symmetric broadband origination and wholesale trunk segment markets, Final Statement and Notification, <http://www.ofcom.org.uk/consult/condocs/llmr/statement/>; and Partial Private Circuits Charge Control, Final Statement, 30 September 2004, [http://www.ofcom.org.uk/consult/condocs/ppc\\_charge\\_control/statement/](http://www.ofcom.org.uk/consult/condocs/ppc_charge_control/statement/).

<sup>14</sup> The SBC/Verizon data used in that comparison reflects the price points identified in the *Stith TRO Remand Declaration* and *Stith Reply TRO Remand Declaration*. The BT data assumes a 10-kilometer Partial Private Circuit (PPC) comparable to the 10-mile standalone special access circuit used in the Stith analysis. The BT comparison is based on an OECD Purchasing Power Parities Rate analysis which is more meaningful for cross-country comparison of prices for particular services than an exchange rate analysis.. See Paul Schreyer and Francette Koechlin, "Purchasing power parities – measurement and uses," 3 OECD Statistics Brief, March 2002 ("PPPs are price relatives, which show the ratio of the prices in national currencies of the same good or service in different countries." *Id.* at 1).

<sup>15</sup> The *TRO Remand Order* did not address the issue of BOC market power over special access, noting only that "incumbent LECs have priced special access tariffs at rates that might be supra-competitive." *Id.* ¶ 64. The analysis therein on geographic markets also suggests that a Metropolitan Statistical Area ("MSA") may be overbroad even for pricing flexibility purposes. *Id.* ¶¶ 79-82 for transport and ¶ 155 for loops.



The evidence supports the conclusion that pricing flexibility does not “drive interstate access prices toward the costs of providing services.” To the contrary, the conclusion is compelled that the Bells have pricing power over the facilities to which pricing flexibility applies. Although the Commission’s policy was well-intentioned, market realities have proven that it is wrong and must be corrected. Moreover, conditions must be adopted in connection with the proposed mergers to address the irresistible incentives those mergers will create for SBC and Verizon to engage in anti-competitive conduct.

II. THE PROPOSED MERGERS, IF CONSUMMATED, WILL ALLOW THE MERGED ENTITIES TO RAISE THEIR SPECIAL ACCESS RATES EVEN FURTHER AND SIGNIFICANTLY INCREASE THEIR INCENTIVE TO DISCRIMINATE AGAINST COMPETITORS.

SBC and Verizon have both urged the Commission in their respective merger proceedings to consider in this proceeding the impact of the mergers on special access.<sup>16</sup> What the evidence shows is that the BOCs’ already substantial market power will be further enhanced if the proposed SBC/AT&T and Verizon/MCI mergers are allowed to proceed without appropriate conditions.

SBC, Verizon, AT&T and MCI have all, at least prior to the announcement of the merger, stated that AT&T and MCI are the largest competitive suppliers and purchasers of special access. Specifically, in this proceeding, Professors Kahn and Taylor characterized AT&T and MCI as the BOCs’ largest special access competitors<sup>17</sup> and

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<sup>16</sup> Merger of SBC Communications Inc. and AT&T Corp., Description of Transaction, Public Interest Showing and Related Demonstrations, WC Dkt. No. 05-65 (Feb. 21, 2005) at 102-105; Verizon’s Public Interest Statement WC Dkt. No. 05-75 (March 11, 2005) at 33, n. 33. BT is of the view that these matters are properly addressed in both proceedings.

<sup>17</sup> Declaration of Alfred E. Kahn and William E. Taylor on behalf of BellSouth Corporation, Qwest Corporation, SBC Communications, Inc. and Verizon, *Special Access Proceeding* (Dec. 2, 2002) (“Kahn and Taylor Declaration”) at 23-24 and Table 14.

customers.<sup>18</sup> Neither AT&T nor MCI contested this characterization; to the contrary, MCI's economist, for example, conceded in his analysis that "AT&T and MCI are the largest special access customers, and also the largest suppliers of competitive special access."<sup>19</sup> This continues to be the case today.<sup>20</sup>

Thus the SBC/AT&T and Verizon/MCI acquisitions will have the following anticompetitive effects:<sup>21</sup>

- **The mergers would eliminate existing horizontal competition.**

As Professors Kahn and Taylor noted, AT&T and MCI are the largest facilities-based competitors because "between 1996 and 1998, the three largest consolidated CAPs were further acquired by AT&T and WorldCom ... AT&T acquired Teleport in January, 1998, and WorldCom bought MFS in August, 1996 and Brooks Fiber in October, 1997."<sup>22</sup> AT&T's and MCI's facilities would not, as a result of these mergers, become available to "a new crop of competitors with dramatically lower cost structures"<sup>23</sup> as might have been the case if those companies had gone bankrupt. Absent the imposition of conditions in this merger, the acquiring firms would most likely absorb or retire the

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<sup>18</sup> *Id.* at 33, *see also* at 31 ("the customers for RBOC special access are largely CLECs and IXC's, and the largest of them [are] AT&T and WorldCom").

<sup>19</sup> Pelcovits Declaration at 10.

<sup>20</sup> *See* AT&T's TRO Remand Comments at 99 ("AT&T, the nation's largest special access customer, typically obtains the largest discounts available" under the BOCs' volume discount plans).

<sup>21</sup> *See* the "Horizontal Impacts Analysis" prepared by Professor Simon Wilkie, former Chief Economist of the Commission filed on May 10, 2005, *Ex Parte* Letter from Brad Mutschelknaus, Kelley, Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Dkt. No. 05-65 (May 10, 2005) as well as his Declaration appended to the *Petition to Deny of CBeyond Communications, Conversant Communications, Eschelon Telecom, NuVox Communications, TDS Metrocom, XO Communications and Xspedius Communications*, ("Petition to Deny") Exhibit A. *See also*, *Ex Parte* Letter from Brad Mutschelknaus, Kelley, Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Dkt. No. 05-65 (June 6, 2005) responding to SBC and AT&T's critique of that analysis, and Comments of Global Crossing North America in the *AT&T/SBC merger proceeding* (April 25, 2005). These documents are incorporated herein by reference.

<sup>22</sup> Kahn and Taylor Declaration 24.

<sup>23</sup> Opposition of SBC Communications, Inc., in the *Special Access Proceeding* (Dec. 2, 2002) at 36.

acquired special access assets.<sup>24</sup> Moreover, as the Commission found in the *TRO Remand Proceeding*, at least for the enterprise segment, there is no intermodal competition.<sup>25</sup> Thus the merger would eliminate virtually all facilities-based competition.

- **The mergers would eliminate all meaningful wholesale competition.**

AT&T and MCI today resell the BOCs discounted special access service (alone and/or in combination with their own facilities) to competitors who serve enterprise business accounts. That is, AT&T and MCI wholesale the BOC special access services, passing on the unique discounts as to which only they could qualify.<sup>26</sup> AT&T and MCI likely do so to meet the onerous minimum volume requirements of the BOC “overlay tariffs.”<sup>27</sup> These discounted rates would no longer be available after the proposed mergers.

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<sup>24</sup> Kahn and Taylor noted that after AT&T and MCI acquired the three largest consolidated CAPs between 1996 and 1998, “there are indeed fewer *independent* CAPs available to AT&T and WorldCom today when they seek alternatives to RBOC special access circuits; but, of course, the capacity of AT&T and WorldCom to supply those facilities themselves increased by the same amount.” *Id.* at 24. Even if there are government-mandated divestitures, the track record of BOC mergers has been to avoid an open auction and they have instead sold the assets to a predetermined purchaser with little or no presence in the market who will remain heavily dependent upon the BOC. *See e.g., In the Matter of the Merger of Qwest Communications, International, Inc. and US West, Inc.*, Comments of AT&T Corp. on the Applicants’ Divestiture Report, CC Dkt. No. 99-272 (filed May 5, 2000) at 5-12, Qwest Reply to AT&T’s Comments on the Divestiture Compliance Report, CC Docket No. 99-272 (May 12, 2000) at 5-11 and Attachment A thereto.

<sup>25</sup> *TRO Remand Order* ¶ 39; (cable companies ... [t]o the extent that they compete in [markets other than the mass market for broadband services], like the enterprise market, such competition is evolving slowly and in more limited geographic areas”); AT&T’s *TRO Remand Comments* at 75-77 and AT&T’s *TRO Remand Reply Comments* at 15.

<sup>26</sup> *See also*, Reply Comments of SBC Communications, *TRO Remand Proceeding*, WC Docket No. 04-313, CC Dkt. No. 01-338, at 33 (MCI and AT&T wholesalers) and Joint Declaration of Scott J. Alexander and Rebecca L. Sparks on Behalf of SBC Communications Inc., ¶¶ 27 and 29-31; AT&T’s *TRO Remand Reply Comments* at 59 (“the record here makes clear that competitors usually provide the private line and other ‘wholesale’ services described on those websites by using the ILEC’s facilities (either as UNEs or as special access)”).

<sup>27</sup> *See, AT&T Corp., Complainant, v. BellSouth Telecommunications, Inc. Def.*, File No. EB-04 MD-010, Memorandum Opinion and Order, FCC 04-278, (December 9, 2004) (the entire record of that proceeding should be incorporated into this proceeding) and various *ex partes* filed in the *TRO Remand proceeding*, *See e.g.*, *Ex parte* letter from A. Richard Metzger, Jr, Lawler, Metzger & Milkman, LLC on behalf of MCI to Marlene H. Dortch, Secretary, Federal Communications Commission, RM 10593 (June 30, 2004); *Ex parte* letter from Patrick H. Merrick, Esq., Director – Regulatory Affairs, AT&T Federal Government Affairs, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM Docket No. 10593

- **The acquisition of the two largest purchasers of special access would eliminate sufficient independent demand, so that new entrants could not reach minimum scale and scope.**

A new facilities-based special access entrant would need to be assured sufficient demand to justify the investment in facilities. That may have been the case for some capacity levels when AT&T and MCI were potential purchasers, assuming AT&T and MCI were free to extricate themselves from the BOCs onerous volume plans. But the acquisition of those two companies and their consequent removal as purchasers from the marketplace, would make facilities investment by any new entrant irrational.

- **The mergers would neutralize the countervailing power of the largest and most sophisticated purchasers.**

To the extent that AT&T and MCI, as the largest purchasers of special access (with the next largest purchaser substantially smaller), were able to exercise countervailing market power to discipline BOC pricing, that countervailing market power would be eliminated with their acquisition.

- **The mergers would eliminate all meaningful threatened competitive entry.**

AT&T and MCI were the parties most likely to self-supply and the BOCs likely priced their special access services so as to discourage this potential self-supply. If those two potential entrants were absorbed, there would no longer be a need on the part of the BOCs to engage in "limit pricing."

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(November 9, 2004) and AT&T's TRO Remand Comments at 149-153. *See also*, the econometric model developed by former FCC Chief Economist, Prof. Joseph Farrell filed by Global Crossing in the *AT&T/SBC merger proceeding*, Statement of Joseph Farrell, Attachment A to Comments of Global Crossing North America (April 25, 2005) at ¶¶ 30-36. All these declarations are incorporated herein by reference.

- **The mergers would raise the brand barrier to entry.**

As noted by Drs. Kahn and Taylor: “the claim that CLECs must incur higher costs than RBOCs to establish a brand may apply to some of them, but surely not to AT&T and WorldCom, which already have business relationships with nearly every customer and who have long-established brands and name recognition, particularly in the market segments for which special access is purchased.”<sup>28</sup> AT&T and WorldCom would no longer be independent competitors, and the remaining CLECs would not have brand recognition.

- **The mergers would, as AT&T predicted in the TRO Remand Proceeding, inevitably result in price squeezes and other discriminatory conduct in the enterprise segment of the market.**

As noted by the merging entities, AT&T and MCI “dominate” the enterprise segment of the marketplace.<sup>29</sup> Price squeezes involving special access are especially likely with respect to enterprise customers because special access constitutes a significant percentage of the overall cost of the service.<sup>30</sup> Even without the substantially heightened incentives created by the proposed mergers, the Bells have engaged in such anticompetitive conduct.<sup>31</sup> The merger would dramatically increase these incentives, as AT&T has noted in the *TRO Remand Proceeding*:

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<sup>28</sup> Kahn and Taylor Declaration at 26-27.

<sup>29</sup> *Ex parte* Letter from Dee May, Vice President, Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Dkt. No. 02-112 (May 19, 2004) (“*Non-Dominance NPRM Proceeding*”) at 1 (AT&T and MCI “dominate the most lucrative portion of the long distance market – the enterprise/large business segment”); Reply Comments of SBC Communications, Inc., *Non-Dominance NPRM Proceeding*, WC Dkt. No. 02-112 (May 19, 2003) at 4 (“the more lucrative enterprise market that remains dominated by the big three IXCs”); AT&T’s TRO Remand Reply Comments at xi (“of the so-called ‘Big 3,’ AT&T is the only carrier currently to earn a profit on its business services”) and 73-74.

<sup>30</sup> AT&T’s TRO Remand Reply Comments at 65.

<sup>31</sup> AT&T and MCI submitted evidence of price squeezes and discriminatory provisioning in the *TRO Remand proceeding*. Declaration of Alan G. Benway, Robert G. Holleron, Jeffrey King, Michael E. Leshner, Michael C. Mullan, and Maureen Swift on Behalf of AT&T, Exhibit B to AT&T’s TRO Remand Comments, incorporated herein by reference, ¶¶ 78-97. The Commission also has substantial evidence of

[T]he Bells do not yet have the ability to offer the full suite of services that enterprise customers desire [Benway-Holleran-King-Lesher-Mullan-Swift Dec.] ¶ 65. Thus, although the Bells' special access prices are anticompetitive[,], raising rivals' costs of offering enterprise services that rely on special access as an input, the Bells do not yet have the ability to create a complete price squeeze for these services. But as they build on their success in price squeezing rivals in the business service markets that they have now entered, they will shortly gain the ability to offer any additional services that they do not have the capability of providing today. *Id.* At that time, they will have the same incentive and ability to price squeeze these other services as they do for the services that they currently offer – and where the evidence clearly shows that they are already undertaking concerted price squeeze campaigns.<sup>32</sup>

With the proposed mergers Verizon and SBC would instantaneously acquire “the ability to offer the full suite of services that enterprise customers desire” with the substantially increased incentives to engage in price squeezes and discriminatory provisioning in that segment of the market.<sup>33</sup>

## CONCLUSION

The record already compiled by the Commission in this, and other proceedings, makes it eminently clear that competitive carriers and their enterprise customers need to obtain access to the BOCs' special access facilities at economic costs – similar to those that the Bells' incur. The current special access pricing flexibility policy, while well-intentioned, is seriously flawed and must be corrected.

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discriminatory provisioning in the Comments filed by AT&T in the various section 272 audits. Comments of AT&T Corp on Verizon's Section 272 Compliance Biennial Audit Report, CC Dkt. No. 96-150 (Apr. 8, 2002), Exhibit 1, Bell Declaration; Comments of AT&T Corp on SBC's Section 272 Compliance Biennial Audit Report, CC Dkt. No. 96-150 (Jan. 29, 2003), Exhibit 1, Bell Declaration; Comments of AT&T Corp on Verizon's Second Section 272 Compliance Biennial Audit Report, EB Dkt. No. 03-200 (Feb. 10, 2004), Exhibit 1, Bell Declaration; Comments of AT&T Corp on BellSouth's Section 272 Compliance Biennial Audit Report, EB Dkt. No. 03-197 (March 9, 2004), Exhibit 1, Bell Declaration; Comments of AT&T Corp on SBC's Second Section 272 Compliance Biennial Audit Report, EB Dkt. No. 03-199 (March 26, 2004), Exhibit 1, Bell Declaration. All these declarations are incorporated herein by reference.

<sup>32</sup> AT&T's TRO Remand Comments at 121.

<sup>33</sup> As AT&T has noted elsewhere, “regulatory safeguards preventing such anticompetitive practices are also required by U.S. multilateral trade obligations.” Comments of AT&T Corp, *Non-Dominance NPRM Proceeding*, WC Dkt. No. 02-112 at 53-56 (June 30, 2003).

Moreover, any clearances of the proposed SBC/AT&T and Verizon/MCI mergers must be subject to conditions that will prevent those companies from increasing their domination of the upstream special access market by eliminating existing and potential competitors and destroying competition in the downstream enterprise service market by discriminating against their competitors in pricing and provisioning.

Respectfully submitted.

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